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No. 93-148

In The

Supreme Court of the United States

October Term, 1993

CRAIG WINES OLIVER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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FURTHER REASONS FOR GRANTING THE WRIT

I.

IS HARVESTED MATERIAL, WHICH HAS NO ROOTS OR ROOT STRUCTURE, WHICH IS DEAD, AND WHICH IS NOT CAPABLE OF REPRODUCING, A "PLANT", THUS TRIGGERING STATUTORY AND SENTENCING GUIDELINE PENALTIES WHICH ARE BASED UPON THE NUMBER OF PLANTS INVOLVED IN THE CRIMINAL ACTIVITY RATHER THAN UPON THE QUANTITY OF CONSUMABLE DRUGS?

Circuit Judge George Pratt, writing for the Second Circuit in *United States v. Proyect*, 989 F.2d 84 (2d Cir. 1993), succinctly summed up the issue raised by the instant petition when he justified the Court's decision to count male plants in the sentencing equation by stating that "congress requires courts to perform this task [the determination of a defendant's statutory responsibilities] by applying the simple concept that 'a plant is a plant is a plant'". 989 F.2d at p. 88.

The cases cited in the petition reveal, however, that the problem is not so simple. (Pet 9-21). Neither Congress nor the Sentencing Commission define the word "plant". The Circuits are deeply divided over the meaning of the word, and inconsistent definitions of "plant" have been adopted depending upon whether the analysis focuses upon seedlings, cuttings, growing plants, harvested plants, or unseized plants which had been harvested in prior years. As the petition further points out, the impact upon petitioner and defendants similarly situated is significant: in petitioner's case, his sentence would have been halved had his case come up in one of the more favorable Circuits. (Pet. 20-21).

The respondent's opposition is not persuasive, and this Court should take this opportunity to create a uniform definition of the

word "plant" that will avoid the serious conflicts which are resulting in extremely differential penalties depending on the geographical accident of where the defendant is prosecuted.

Specifically, the respondent makes the following arguments (Resp. 7-12):

1. The issue only relates to the Sentencing Guidelines and does not implicate problems of statutory interpretation. (Resp. 7-8). This argument is not correct. The statutory penalties, whatever they are, are based upon the number of plants involved in the criminal activity. *See, e.g.*, 21 U.S.C. § 841(b)(1)(A)(vii), 21 U.S.C. § 841(b)(1)(B)(vii) and 21 U.S.C. § 841(b)(1)(D). Since Congress has not defined the word "plant", the issue raised by the petitioner also deals with the interpretation of these statutes as well as the interpretation of the corresponding provisions of the Sentencing Guidelines.

2. The government characterizes the issue as one involving "unprocessed" plants. (Resp. 8-9). This is a misstatement of the cases and the issue involved. When plants are growing, they represent a greater societal risk than after they have been harvested. During the growth cycle, it is impossible to predict the amount of marijuana that will be produced, and greater or lesser amounts of consumable drugs ~~may~~ result depending upon a number of factors ranging from the skill of the grower to weather conditions. However, once the plants are harvested, the societal risk is lesser. The risk is fixed because the amount of consumable marijuana can be easily determined even though the harvested marijuana has yet to be "processed". Moreover, there is nothing in the cases, the guidelines, or the statutes which support sentencing distinctions based upon "processing".

3. The government argues that the defendant's plea to a manufacturing charge requires the use of plants as the sentencing

measuring stick. (Resp. 9). However, the two Seventh Circuit cases which the government cites are controverted by other cases such as *United States v. Blume*, 967 F.2d 45 (2d Cir. 1992). Because of this Circuit conflict and because neither the statutes nor the guidelines necessarily equate a plea to a manufacturing charge with the use of plants to compute a sentence, the government's argument merely illustrates why this Court's review is justified and required.

4. The government claims that the "seedling" cases are irrelevant because those cases don't deal with the issue of whether it makes a difference whether the grower is apprehended prior to or after harvest. (Resp. 9-10).

The government, however, is confusing a legislative issue with a judicially oriented definitional problem. If Judge Pratt was right in *Proyect, supra*, then a single definition should be used for "plants" regardless of whether the context is seedlings, cuttings, growing plants, harvested plants or unseized materials which had been grown in prior years. If the Justice Department wants to modify the statutory penalties so that they are based upon the status of the defendant rather than upon the nature of the illegal materials, then it should address those concerns to Congress rather than to the courts.

As pointed out in the petition, the Sixth, Eighth, Ninth, and Tenth Circuits have adopted a definition of plant ("organism with a defined root structure") that is in conflict with the definition used to establish petitioner's sentence. Indeed, the Sixth Circuit seems to have implicitly adopted two separate definitions of "plants" which vary depending on whether the organism is considered at the seedling or harvested stage. The seedling/cutting cases are thus very relevant and point out the need for this Court's intervention to bring uniformity to sentencing.

5. The government addresses certain cases cited by the

petitioner relating to harvested materials and tries to distingish them. (Resp. 10-12). However, a close reading of those cases does not support the government's analysis.

In *United States v. Corley,* 909 F.2d 359 (9th Cir. 1990), the Circuit Court approved the use of "plants" as the measuring stick when the plants were live, and "weight" as the measuring stick after harvest. 909 F.2d 359, 361. The government acknowledges the distinction but tries to minimize it by arguing that the *Corley* court did not consider the situation where the harvested materials were not fully dried. (Resp. 10-11). The government's argument ignores the fact that the distinction was between "live" plants and harvested materials, as opposed to partially or fully dried materials. Indeed, the government's attempt to distinguish the case points out the need for this Court's guidance because it points out the confusion and lack of agreement as to where the proper line of demarcation should be drawn.

In *United States v. DeLeon,* 955 F.2d 1346 (9th Cir. 1992), the Ninth Circuit again confirmed that a "plant" measurement should be used for live organisms and a "weight" measurement should be used after harvest. The government's brief correctly points out that the *DeLeon* opinion was withdrawn when the panel reversed its decision based upon an unrelated issue. *United States v. DeLeon,* 979 F.2d 761 (9th Cir. 1992). (Resp. 11, n. 3). However, the government does not note that the original *DeLeon* panel's distinction between "live" and "dead" materials was reconfirmed by a later case, *United States v. Traynor,* 990 F.2d 1153, 1160 (9th Cir. 1993).

In *United States v. Bradley,* 905 F.2d 359 (11th Cir. 1990), the panel approved the dicta of the *Corley* distinction between live and harvested materials. The government tries to downplay this approval on the grounds that it is dicta. (Resp. 11).

In *United States v. Osburn*, 955 F.2d 1500 (11th Cir. 1992), the Eleventh Circuit noted the anomaly between the penalties assessed against persons arrested with growing plants and persons arrested after harvest but held that this distinction did not affect the constitutionality of the sentencing scheme. The government tries to minimize the case by arguing that the Eleventh Circuit did not make a direct holding because such a holding was not required by the context of the case. (Resp. 11).

Finally, the government reluctantly agrees that *United States v. Blume*, 967 F.2d 45 (2d Cir. 1992) is in conflict with petitioner's case with respect to prior year's harvests. (Resp. 12). The government, however, misstates the thrust of the opinion and incorrectly argues that the *Blume* court's distinction between growing and harvested materials does not apply to petitioner's facts. (Resp. 11-12).

The government's analysis highlights the problem. The Circuits are divided on the question of whether Congress and the Sentencing Commission intended to punish marijuana manufacturers as a class (all growers should be harshly treated regardless of when they are caught) or on a risk analysis (the risk is greatest when the materials are live and growing; accordingly, the penalties should be greater for live materials than they should be when the materials are immature or harvested). Petitioner believes that the risk analysis is the correct approach. In any event, the division between the Circuits and the disparate treatment of defendants based upon geography justify this Court's review.

6. Finally, the government argues that this Court should not review the definitional issue because it might be addressed some day by the Sentencing Commission, citing *Braxton v. United States*, 111 S. Ct. 1854, 1857-1858 (1991).

However, the government misconstrues *Braxton*. In that case,

this Court stated that while Congress or agencies can correct conflicts by amending statutes or rules, the duty to interpret statutes or rules belongs "initially and primarily" to the judiciary, including this Court. 111 S. Ct. 1854, 1857. In *Braxton*, the Sentencing Commission was actively addressing the very issue presented by the case. Accordingly, this Court concluded that it would not resolve the question "because the Commission has already undertaken a proceeding that will eliminate circuit controversy". 111 S. Ct. 1854, 1858. In this case, the government does not cite any pending review of the "plant" definition either by Congress or by the Sentencing Commission. In the absence of such review, the judiciary has the primary responsibility to define terms that affect the substantial rights of parties and which are undefined by Congress or by entities such as the Sentencing Commission.[1]

II.

SHOULD FEDERAL COURTS REQUIRE PROSECUTORS TO STRICTLY COMPLY WITH THE TERMS OF PLEA AGREEMENTS OR SHOULD PROSECUTORIAL BREACHES OF PLEA AGREEMENTS BE EXCUSED BY PLAIN ERROR, HARMLESS ERROR, OR OTHER TYPES OF PROCEDURAL ANALYSES?

The respondent's brief argues that there is no need to grant certiorari because the government did not breach the plea agreement in this particular case. (Resp. 12-16). Specifically, the government argues:

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1. Indeed, as *Braxton* suggests, this Court could exercise its discretion to review an issue even if Congress or an agency were undertaking a contemporaneous review. The restraint suggested by *Braxton* is permissive not mandatory. Indeed, in *Braxton*, the Court reached the merits and resolved the case on other grounds despite the Sentencing Commission's consideration of the primary legal issue in the case and despite the option that this Court had to simply dismiss the case on the grounds that certiorari had been improvidently granted.

A. Focusing solely upon the evidentiary hearing about drug quantities,[2] the government argues that the prosecutor was entitled to present evidence about the number of plants and that the prosecutor did not make arguments which were contrary to the plea agrement. (Resp. 14-15). The respondent's brief does not address the prosecutor's sentencing memorandum or the prosecutor's comments at sentencing.

B. The government argues that the prosecutor was entitled to oppose the acceptance credit because the petitioner did not fully cooperate with the probation officer. (Resp. 16).

C. The government argues that the prosector was entitled to argue for a four level role enhancement because there was additional evidence which supported that classification.[3] Alternatively, the government argues that the prosecutor's actions were harmless because the district court did not accept the prosecutor's arguments about petitioner's role in the offense. (Resp. 16).

Petitioner believes that the respondent is wrong and that there clearly was a breach of the plea agreement.

U.S.S.G. 6B1.4 encourages factual stipulations in plea agreements. Since factual stipulations between the defendant and

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2. Although the petitioner raised all of the breaches described in his petition and *infra*, the Sixth Circuit only discussed one factor in denying relief. Petitioner believes that this was error because the court did not consider the totality of the prosecutor's conduct. The respondent's brief is equally flawed because it attempts to justify some of the prosecutor's conduct while ignoring the totality of the prosecutor's actions.

3. The prosecutor below never specified what that additional evidence was; neither does the respondent's brief. In fact, petitioner believes that this assertion is suspect because the evidentiary hearing only produced evidence that the prosecutor knew about prior to entering into the plea agreement.

the United States do not bind the Court [U.S.S.G. 6B1.4(d)], the defendant's incentive for entering into such stipulations and for giving up substantial rights by pleading guilty is the fact that the prosecutor's advocacy at sentencing is limited by the agreements reached between the parties. Additionally, both the defendant and the government limit the risk that disputed factual matters will be decided adversely to them.

The petitioner argued that the prosecutor breached the plea agreement by the totality of the following actions:

A. The prosecutor knew that there was disputed evidence about the amount of plants involved in the petitioner's offense conduct. The main purpose for the plea agreement's factual stipulation was to resolve this dispute. Yet, the prosecutor intentionally introduced testimony that was not about the reserved issue (whether the quantity was between 100-700 plants) but which was about disputed estimates which the plea agreement was designed to resolve.

B. The prosecutor vouched for the reliability of the witnesses he presented and openly and repeatedly indicated his belief that the quantities exceeded those specified in the plea agreement.[4]

C. When the presentence officer recommended that a 1000-3000 plant range be used, the prosecutor's sentencing memorandum enthusiastically supported that result.

D. Even though the plea agreement stipulated that the

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4. If the prosecutor did not agree with the factual stipulation, he shouldn't have entered into it. U.S.S.G. 6B1.4 requires the parties to act in good faith and to identify factual matters which are in dispute. The factual matter in dispute was about the 100-700 plant range; it was not about matters which were outside of the range stipulated by the parties.

relevant conduct period covered two years, the prosecutor's sentencing memorandum argued that a four year period should be considered.

E. The prosecutor's sentencing memorandum recommended against the acceptance of responsibility credit. One of the reasons given was that regardless of petitioner's interaction with the probation officer, he was, in general, not qualified for consideration under U.S.S.G. 3E1.1.[5] This reason was totally contrary to the plea agreement stipulation.

F. Despite the plea agreement stipulation, the prosecutor argued for a role enhancement based upon an organization involving five or more people. Even though the district judge did not accept this argument, the prosecutor's overall disregard of the plea agreement is illustrated by his position on petitioner's role.

G. The positions taken in the prosecutor's sentencing memorandum were confirmed by the positions taken at the sentencing hearing.

The position taken in the respondent's brief simply illustrates the conflict between the Circuits as to whether prosecutors should be strictly held to their bargains or whether prosecutorial breaches should be excused if they are minor. (Pet. 22-23). If this case had arisen in the Third or Fifth Circuits, petitioner would have won, regardless of the standard of review. *See, e.g., United States v. Goldfaden,* 959 F.2d 1324 (5th Cir. 1992); *United States v. Valencia,* 985 F.2d 758 (5th Cir. 1993); *United States v. Hayes,* 946 F.2d 230 (3d Cir. 1991); and *United States v. Badaracco,* 954 F.2d 928 (3d Cir. 1992). All of these cases granted relief in situations

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5. The respondent's brief does not acknowledge this separate breach and instead focuses only upon the alleged non-cooperation with the probation officer. (Resp. 16).

where the totality of the prosecutor's conduct was far less egregious than evidenced in this case.

Petitioner believes that a prosecutor should be held strictly to the bargain and that a defendant should not be induced to give up substantial rights only to discover that the bargain was illusory. This is an important split between the Circuits about a critical matter that justifies this Court's review.

The respondent's brief acknowledges that there is a split among the Circuits as to whether a breached plea agreement must be raised in the district court in order to be reviewed other than by a plain error standard. (Pet. 25-29; Resp. 12-13). The respondent does not further address the issue, electing instead to base its argument upon its position that the plea agreement was not breached. For the reasons stated in the petition, petitioner believes that this second and independent split between the Circuits is also worthy of this Court's review.

Respectfully submitted,

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